No. 21015

United States
COURT OF APPEALS
for the Ninth Circuit

MARYLAND CASUALTY COMPANY,
a Maryland Corporation,

Appellant,

v.

CLEAN-RITE MAINTENANCE COMPANY,
an Oregon Corporation,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
for the District of Oregon
HONORABLE BRUCE R. THOMPSON, District Judge

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SUBJECT INDEX

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STATEMENT OF THE CASE

Maryland Casualty Company, plaintiff-appellant, (hereinafter referred to as "Maryland"), was the public liability insurance carrier for the estate of Marie Caraplis, deceased, which estate was and still is the owner and operator of an office building in Portland, Oregon, commonly known as the Postal Building. Charlotte Ann Relos and Georgia Mae Caraplis were coexecutrices of the estate of Marie A. Caraplis, deceased, and Charlotte Ann Relos (hereinafter referred to as "Mrs. Relos") was the manager of the Postal Building in her fiduciary capacity.

Defendant-appellee, Clean-Rite Maintenance Company, was an Oregon corporation engaged in the business of maintenance work. Mr. V. J. Hill (hereinafter known as "Mr. Hill") was the president of Clean-Rite Maintenance Co., (hereinafter referred to as "Clean-Rite"). Lee A. Ramsey (hereinafter known as "Ramsey"), was an employee of Clean-Rite on June 12, 1963.

Prior to June 12, 1963, Mrs. Relos was managing the Postal building as coexecutrix of the aforementioned estate. She entered into an oral agreement with Clean-Rite, through Mr. Hill, whereby Clean-Rite agreed to clean the windows of the Postal building. The extent and nature of the agreement forms part of the issue in the within appeal.

Ramsey, while employed by Clean-Rite, on June 12, 1963, while engaged in washing the Postal Building windows, fell from the 4th to the 2nd floor (the roof of an

adjoining building), and sustained severe personal injuries. Ramsey thereafter brought an action against the estate in Multnomah county, seeking damages for personal injuries suffered in his fall. The Postal Building tendered the defense of the Ramsey action to Clean-Rite. When Clean-Rite refused the tender, Maryland, as the public liability insurance carrier of the estate, undertook the defense and subsequently settled the Ramsey action for $22,500.

The within action is one for breach of contract, whereby Maryland, as subrogee of the owners and operators of their insured, the Postal Building, contend that Clean-Rite breached its contract to procure insurance to protect the owners and operators of the Postal Building from losses such as that sustained in the Ramsey case. Basically, Maryland's evidence showed that the agreement entered into between Clean-Rite and Mrs. Relos on behalf of the Postal Building included an agreement that Clean-Rite would procure insurance which would protect the Postal Building of and from any and all claims of any kind and nature arising out of the window washing operations of Clean-Rite.

At the trial, Clean-Rite contended: (1) that Maryland was not entitled to subrogation; (2) that there was no legally enforceable contract to procure insurance for the Postal Building.

Charlotte Ann Relos was the manager of the Postal Building (Tr. 31). The Postal Building had public liability insurance with Maryland at the time of the accident to Ramsey (Tr. 31).

Mrs. Relos first met Mr. Hill about two years prior to the accident when she was looking for someone to do the window washing on the building. She heard of Mr. Hill from a mutual friend and looked up his ad in the telephone book (Tr. 31).

At the time of the negotiations between Mrs. Relos and Mr. Hill regarding the contract, Associated Building Maintenance Company was cleaning the Postal Building windows (Tr. 33). At the initial conference, Mrs. Relos testified that they spoke of insurance as follows:

> "A. Well, I called him and he came down to the office and we were discussing doing the window washing at the building, and I told him that—I asked him what type of coverage he carried, because we wanted complete coverage on everything.
>
> And he went on to tell me, particularly I do remember the rest of the conversation that he carried extra insurance with the Zurich Company, and that is why he had to charge a bit more for—on the regular rate. Most of the window washers have about the same rate for the size of the building. I think they do it on account of the windows. At any rate, his fee was more, and I asked him why, and he said because he carried such extra heavy insurance to cover us in any circumstances which might arise." (Tr. 32-33)

Several other conversations were held where the same representation was made and insurance thoroughly discussed by the parties (Tr. 33). Mrs. Relos hired Mr. Hill because, although the charge was more, "I figured we had better protection" (Tr. 34).

When the contract between the Postal Building and Associated Building Maintenance Company expired, in the middle of June, 1963, Mrs. Relos and Mr. Hill spoke again and Mrs. Relos testified:

> "Yes, and our contract had expired with the previous firm, and I told him that this would be a contract basis, and he said, 'Fine.'" (Tr. 34)

The contract was to be of 12 months' duration (Tr. 34-35).

Mrs. Relos first contacted Mr. Hill by examining the yellow section of the telephone book (Pl. Ex. 7) page 748 (Tr. 35-36). She testified:

> "Q. What is that you are looking at?
>
> A. Well, it is the large ad in the advertising, Clean-Rite Maintenance, and goes on to say what they do, and fully insured for your protection.
>
> Q. Did you read that?
>
> A. Yes, I did. And, as I told you, I am particularly interested in ads in this yellow section, because I used to write them when I worked for the telephone company." (Tr. 36-37)

The contract price with Clean-Rite was $60, whereas the consideration for the previous contract with Associated Building Maintenance Company was $47.50 (Tr. 37). The windows were to be cleaned every other month (Tr. 37).

Under cross-examination, Mrs. Relos testified:

> "A. He said that we would be completely covered if anything arose that was wrong that would hurt us; anything wrong he would have the complete insurance coverage, and that is all I was interested in.

Q. So far as his operations were concerned, you were fully protected?

A. Yes.

Q. That is as far as the conversation went?

A. No. We went into it.

Q. What else did you go into?

A. He told me that he carried a type of bond. Now—a type of bond, and he carried this Zurich, with the Zurich Company, and he told me that it just covered extra insurance.

And I asked him, 'Why do you charge more than—' most window washing companies charge about the same. And he said because of the extra coverage he carried, and that is why he had to charge more, but in turn the people that had his services were covered more." (Tr. 40-41)

Defendant's sealed Exhibit No. 22 was a letter dated August 29, 1963, addressed to Hill by Mrs. Relos, which contained the following:

"Dear Sir:

When we discussed your rates for the window washing in the Postal Building, you explained to me that they were higher than I expected because you carried such extensive insurance to cover any exigency that might arise.

As you know Mr. Lee Ramsey has engaged an attorney to pursue a claim against the Postal Building for injuries received in the accident of 6/12/63.

It occurs to me now in view of your earlier comments about insurance that the Postal Building might be covered for this claim under your insurance policies.

I would appreciate it if you would advise me as soon as possible on this point." (Tr. 43)

The most recent telephone directory yellow pages revealed a complete change in language employed by Clean-Rite:

> "If it is glass—we clean it. All employees bonded and insured. For information call Clean-Rite Building Maintenance Company, Inc." (Tr. 61)

Mr. Hill admitted there were prior conversations before the contract was entered about what he termed "bond" (Tr. 62-63). He had earlier testified that there were no conversations about insurance prior to the entering of the contract (Tr. 58).

Following presentation of the evidence and some legal argument, the court directed a verdict in favor of the defendant-appellee Clean-Rite Maintenance Company (Tr. 90-91). The judgment on record herein indicates the court's summation of its reasons for so ruling.

It is appellant's position that the court's ruling was clearly erroneous and that there was sufficient evidence to take the case to the jury.

SPECIFICATIONS OF ERRORS

1. The District Court erred in directing a verdict in favor of the defendant-appellee and against the plaintiff-appellant, ruling that plaintiff-appellant failed to make a jury question.

2. The District Court erred in holding that the contract between the appellant's subrogor and the appellee was too vague and indefinite to be enforceable.

3. The District Court erred in finding that the agreement between the plaintiff-appellant's subrogor and the defendant-appellee was one of insurance, or one to indemnify, instead of an agreement to procure insurance, and in misapplying the law of the former to the latter.

SUMMARY OF ARGUMENT

The District Court erred in failing to submit the within controversy to the jury. The directed verdict in favor of the defendant was premised upon a misconception of plaintiff's theory of the case: a breach of *contract to procure* insurance in contradistinction to a contract to insure.

ARGUMENT

1. Appellant introduced substantial evidence of a contract to procure insurance on the part of appellee.

This appeal is occasioned by an unfortunate misconception of the appellant's theory of recovery by the District Court (apparently aided by the misunderstanding of appellee). The judgment order reflects this error (p. 2):

> "The court, after having heard argument of counsel and having itself examined into the law relating to the matter, concluded therefrom that defendant's motion for a directed verdict was well taken and should be granted for the reason that plaintiff's evidence had failed to make out sufficient evidence of the terms of an oral contract of insurance to protect the Postal Building or to indemnify the Postal Building or the plaintiff as contended

for by the plaintiff in its complaint and pretrial order."

The complaint passes from the case under the pretrial order. There, plaintiff-appellant contended, III (1):

"That as a part of the agreement entered into between the Defendant and the estate of Marie A. Caraplis whereby the Defendant agreed to clean the windows of the Postal Building, it was further agreed that the Defendant would *procure insurance* which would protect the estate of Marie A. Caraplis of and from any and all claims of any kind and nature." (emphasis supplied)

The issues of fact set forth in the pretrial order included, *inter alia,* V(1), (2):

"(1) Did Defendant agree to *procure insurance* for the benefit of the estate of Marie A. Caraplis which would save harmless the estate of Marie A. Caraplis of and from any and all claims of any kind and nature?

(2) If so, what are the terms of such agreement?" (emphasis supplied)

The Issues of Law provided, *inter alia,* VI (1), (2):

"(1) Did Defendant as part of its agreement with the estate of Marie A. Caraplis legally obligate itself to *procure insurance* for the benefit of Marie A. Caraplis which would hold said estate harmless from any and all claims of any kind?

(2) If so, are the terms of this contract definite enough for the Court to fix the exact legal liability of the parties?" (emphasis supplied)

At no time did the appellant claim that appellee en-

tered into an oral contract of insurance, or an oral contract to insure appellant's subrogor. The law relating to such contracts, and the acceptable standards of proof, greatly vary from the standards for a contract *to procure insurance.*

Appellee has contended throughout the case that a contract to procure insurance must be proved with the same certainty as an oral contract to insure (See appellee's memorandum to the trial court, and argument of counsel, Tr. 79-84). In support of its position appellee cited to the District Court *Cleveland Oil Co.* v. *Norwich Ins. Society,* 34 Or. 228, 55 Pac. 435 (1898) and *Cerino* v. *Oregon Physicians' Service,* 202 Or. 474, 276 P.2d 397 (1954). Presumably appellee will continue to rely upon these inapposite cases. Neither decision involved a contract to procure insurance; both were concerned with oral contracts of insurance. Both decisions are therefore inappropriate for consideration within the current context.

The *Cleveland Oil Co.* and *Cerino* decisions, if anything, stand for the proposition *(a fortiorari)* that an oral contract of insurance is valid. It would follow that oral contracts *to procure insurance* are likewise valid. Validity and requisite proof are two different matters and that apparently aided in the lower court confusion.

The Oregon law respecting contracts *to procure insurance* has recently been clarified in *Hamacher* v. *Tumy et al,* 222 Or. 341, 352 P.2d 493 (1960). The lower court instructed the jury that a contract to procure insurance had to be proved with the same certainty as a parol con-

tract of insurance. 222 Or. at 346. The Supreme Court reversed and remanded the case, holding that the instruction was prejudicial error. O'Connell, J., speaking for the Court, asserted, 222 Or. at 349:

> "Must the promisee of a contract to procure insurance prove all of the essentials of a contract of insurance with the same specificity that is required of a promisee asserting the existence of a contract of insurance? The instructions to the jury could be taken to mean that plaintiff was required to prove each of the enumerated elements of a contract of insurance by showing that the parties came to an agreement with respect to each of these separate elements.
>
> We are of the opinion that the instructions so interpreted placed upon the plaintiff too heavy a burden of proof. * * *"

It is true that *Hamacher* was concerned with a contract by an insurance broker or agent to procure insurance for a client but that would not distinguish the decision from the case at bar.

The defective instruction was premised upon some unfortunate dictum in *Rodgers Insurance Agency* v. *Andersen Machinery,* 211 Or. 459, 316 P.2d 497 (1957). The *Hamacher* court labeled the language in *Rodgers* as dictum and clearly indicated its disapproval of the "rule" of *Rodgers.* See 222 Or. at 347-348. The Court stated, 222 Or. at 350:

> "The principal vice of the instruction is that it could be considered by the members of the jury as prohibiting them from finding a contract to procure insurance from facts short of an express agreement

> to that effect. There were facts from which a contract to procure insurance could reasonably be implied."

In several decisions approvingly cited by the Oregon Supreme Court, the elements were much less certain than in the instant case, yet the courts held the proof sufficient to establish a contract to procure insurance. See cases discussed 222 Or 353, et seq.

There is no doubt that appellant adduced substantial proof to support its claim, i.e., breach of a contract by appellee to procure insurance for appellant's subrogor. In logic as in law, such proof need be less strict than proof of an oral contract of insurance. A contract to procure insurance may develop from negotiations where agreement by the parties on certain essential elements of the *insurance* contract is not achieved. See *Hamacher* v. *Tumy et al,* supra, 222 Or. at 353, citing, e.g., *Burroughs* v. *Bunch,* 210 S.W.2d 211 (Tex. 1948). Appellant has sufficiently proved its case if it shows that Hill, on behalf of appellee, negotiated a contract with Mrs. Relos, on behalf of the Postal building, whereby Hill, *inter alia,* agreed to procure insurance which would protect the Postal Building from loss arising out of the operations in and about the building by Clean-Rite. This was clearly proved (Tr. 32-44).

It was difficult to determine the basis of the District Court's direction of verdict but presumably, from the argument on motion (Tr. 76-91), the court felt a strict proof of the essentials was required and unsatisfied.

The elements of an *oral contract* of insurance set

down in the *Rodgers,* supra, and *Cleveland Oil Co.,* supra, cases are five in number:

(1) The subject matter must exist;

(2) There must be a risk insured against;

(3) The amount of indemnity must be determined;

(4) The duration of the risk must be known;

(5) The premium must be paid or exist as a valid charge.

Even accepting appellee's premises, *arguendo,* and overlooking the commands of *Hamacher* v. *Tumy,* supra, appellant adduced proof of the essential elements:

(1) The subject matter was clearly the operation of appellee in and about the Postal Building (Tr. 32-44).

(2) The risk insured against was the harm or risk of loss to the owners and operators of the Postal Building arising out of the appellee's operation (Tr. 33, 39, 40, 41).

(3) The amount of indemnity, while not specified, inferably was a sufficient amount to protect the subrogor from harm, limited by the risk.

(4) The duration obviously coincided with the term of the contract, one year (Tr. 34, 35).

(5) The premium or consideration would account for the difference in cost to the subrogor of the previous maintenance contract and that entered into with appellee (the difference between $47.50 and $60.) (Tr. 37).

Clearly appellant provided substantial evidence to convince a jury of the existence and the terms of the contract. A fact question was presented for jury determination and the court erred in directing a verdict.

2. The appellant proved a sufficiently definite contract to indemnify against its own negligence.

It would seem that the learned District Court may have directed its verdict on the ground that appellant had to prove a contract to indemnify against its own negligence with the requisite specificity. Basically, appellant makes two related contentions:

(1) There is no sufficient evidence upon which the trial court could reach the conclusion that the accident to Ramsey was caused by the negligence of appellant's subrogor.

(2) Even if the court was justified in reaching this conclusion, the contract proved by appellant was sufficiently definite in its terms to be an enforceable contract to insure against appellant's subrogor's own negligence.

Basically, there was insufficient evidence to establish the causative force injuring Ramsey. A lawsuit was filed by Ramsey against the owners and operators of the Postal Building (Tr. 27-28) and the defense was undertaken by appellant when appellee refused the tender of defense. Ramsey's attorney did not testify as to causation but merely said "In my expert opinion, it was a case of dramatic liability that I thought would appeal to a jury" (Tr. 30).

Mr. Hill testified that he examined the accident scene and found that the safety anchor was broken in half, part on the Postal Building and the rest where Ramsey fell (Tr. 56). He found the anchor bolt had been attached to wood he described as "rotten" (Tr. 56). Mr. Hill never heard of jacks (Tr. 60-61-62) a common safety device in the business and presumably his employees did not use them. The eye-bolt on one side of the belt was embedded in the window from where Mr. Hill examined the scene (Tr. 61). Mr. Ken Wicklund, a representative of appellant, also viewed the scene on the day of the accident (Tr. 66). The wood frame of the window was broken and the eye-bolt was missing; there were no jacks in evidence at the scene (Tr. 72).

It is clear from the summary of the evidence presented that appellee's contention in the District Court that the cause of Ramsey's harm was the Postal Building's negligence is unfounded.

Assuming, *arguendo,* that the negligence of the Postal Building caused or contributed to the harm suffered by Ramsey, appellant contends that appellee's contract to procure insurance was proved to include an assurance against any negligence of the Postal Building. The desire of the fiduciaries of an estate to protect assets, such as the Postal Building, is understandable.

Oregon has long established the rule that one may, by contract, be indemnified from the consequences of his own negligence. In *Unitec Corporation* v. *Beatty Safway Scaffold Co. of Oregon,* 358 F.2d 470 (9th Cir. 1966) this Court reversed the Oregon District Court, and

held, *inter alia,* 358 F.2d 479:

> "The district court concluded that the contract was not sufficiently explicit in its indemnification requirements to hold Unitec responsible for Goodyear's acts of negligence. With this conclusion, we are unable to agree.
>
> "In our view, a reasonable reading of the above provisions leads to the conclusion that the indemnification covers claims arising from injury to any other person or property occasioned in whole or in part by any act or omission of Unitec or its agents. The district court concluded, and we agree, that Unitec's acts or omissions were partially responsible for the damages that occurred to Safway's property. By express contractual design, and in the absence of a contrary public policy or unfair bargaining positions, these parties intended a certain result and therefore must be considered as having themselves defined their rights."

Therefore, this Court upheld Unitec's specific agreement to hold the purchaser harmless at all times against any liability, and for all claims, even where occasioned by the indemnitee's negligence. The instant case presents precisely the same question.

In *Unitec,* supra, this court distinguished two early Oregon cases, *Southern Pacific Co.* v. *Layman,* 173 Or. 275, 145 P.2d 295 (1944) and *Glens Falls Indemnity Co.* v. *Reimers,* 176 Or. 47, 155 P.2d 923 (1945) (relied upon by the District Court in the instant case), as decisions where the indemnitor had been free from fault. 358 F.2d at 479. The same distinction would seem to be equally applicable to this case.

Oregon Supreme Court decisions have recognized that persons can enter into agreements exonerating them from the consequences of their own negligence. A bailee has a right by contract, to exonerate himself from liability for loss of goods, resulting from his own negligence. *Irish & Swartz Stores* v. *The First National Bank of Eugene,* 220 Or. 362, 349 P.2d 814 (1960); *Pilson* v. *Tip-Top Auto Co.,* 67 Or. 528, 136 Pac. 642 (1913).

In *Southern Pacific Co.* v. *Morrison-Knudsen Co.,* 216 Or. 398, 338 P.2d 665 (1959) indemnity was permitted for the indemnitee's own negligent conduct under language which was arguably more broad than that relied upon by the District Court below. The court does not re-write agreements clearly expressed between the parties. A clear expression of intention to indemnify the Postal Building for its own negligence is inferable from the evidence in this case and should be upheld under the *Southern Pacific Co.* v. *Morrison-Knudsen Co.,* supra, doctrine. The dependence of one party upon the other seems important there. See 216 Or. at 412. Here appellee's conduct would certainly indicate control over the "injury potential" of the job. Also, the Oregon cases look to disparity or equality of bargaining power as a criterion for enforcement of the agreement. See., e.g., 216 Or. at 418 et seq. Here it is clear that the Postal Building relied upon the expertise of appellee and that the parties were at least co-equal in their bargaining power.

Indemnity for the consequences of one's own negligence was affirmed in other jurisdictions, See, e.g., *Ryan Mercantile Company* v. *Great Northern Rwy. Co.,* 186 F. Supp. 660 (D. Mont. 1960).

It is thus clear that the Oregon law permits an indemnitee to secure indemnity for its own negligence. It remains to examine the evidence presented in the District Court to determine whether appellant presented substantial evidence of such an agreement.

Appellant is cognizant of the factual conflict in the instant case. A review of the evidence favorable to appellant (e.g. Tr. 32-35, 37, 39-40, 41, 43-44, 61-63; Ex. 22) reveals a jury question presented upon the issue of whether or not appellee contracted to procure insurance which would protect the Postal Building from the consequence of its own negligence. The trial court erred in directing a verdict and removing this question from the jury.

Mr. Hill testified that he had a policy with Zurich Insurance Company at the time of the negotiation and at the time of the accident (Tr. 16-18; Ex. 5). He testified that insurance was never discussed by the parties prior to the accident (see, e.g. Tr. 24) but later recanted and admitted considerable discussion about what he called "bond" (Tr. 62-63).

Mrs. Relos, in her fiduciary capacity and as manager of an important asset of the estate, was most concerned about insurance, and her testimony would permit a jury to find that she entered a contract with appellee whereby appellee promised to procure insurance which would indemnify the Postal Building, *inter alia,* from the consequences of its own negligence (See Tr. 32-44 generally).

Mrs. Relos testified that Mr. Hill told her he would

charge more because his clients would be completely covered or insured (Tr. 32):

"At any rate, his fee was more, and I asked him why, and he said because he carried such extra heavy insurance to cover us in any circumstances which might arise." (Tr. 33)

Mrs. Relos also testified:

"* * *. And he said, 'For the insurance that I carry, you would be covered for any type of situation that might arise.'

And this is what impressed me." (Tr. 33)

* * * * *

"He said that one reason that his charge was more was because he had to pay extra for such heavy insurance to protect the people that he work for." (Tr. 39)

* * * * *

"Q. And he had indicated to you he had Workman's Compensation, didn't he?

A. Yes, and extra coverage, too, with Zurich Company and others.

Q. With regard to what?

A. Any accident that might arise or anything; * * *." (Tr. 40)

* * * * *

"A. He said that we would be completely covered if anything arose that was wrong that would hurt us; anything wrong he would have the complete insurance coverage, and that is all I was interested in.

Q. So far as his operations were concerned you were fully protected?

A. Yes." (Tr. 40)

* * * * *

"A. He told me that he carried a type of bond. Now—a type of bond, and he carried this Zurich, with the Zurich Company, and he told me that it just covered extra insurance.

And I asked him, 'Why do you charge more than—' most window washing companies charge about the same. And he said because of the extra coverage he carried, and that is why he had to charge more, but in turn the people that had his services were covered more." (Tr. 41)

There is no doubt that appellant's evidence presented a jury question on the existence and terms of the contract of insurance appellee promised (and failed) to procure. The District Court erred in taking the case from the jury.

CONCLUSION

The district court's direction of a verdict against appellant and in favor of appellee was clearly erroneous and should be reversed. Appellant's evidence presented a jury question upon the issue of the terms of a contract by appellee to procure insurance to protect appellant.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES H. BRUCE
Of Attorneys for Appellant